CHUBB INSURANCE (MALAYSIA) BHD & ORS v. COMPETITION COMMISSION

COMPETITION APPEAL TRIBUNAL, KUALA LUMPUR
CHOO KAH SING J (CHAIRMAN)
ASMABI MOHAMAD J (COMM)
VICTOR WEE ENG LYE (COMM)
[IN THE MATTERS OF TRP 2-2020; TRP 4-2020; TRP 6-2020; TRP 7-2020; TRP 8-2020; TRP 9-2020; TRP 10-2020; TRP 11-2020; TRP 12-2020; TRP 13-2020; TRP 14-2020; TRP 15-2020; TRP 16-2020; TRP 17-2020; TRP 18-2020; TRP 19-2020; TRP 20-2020; TRP 21-2020; TRP 22-2020; TRP 23-2020; TRP 24-2020 & TRP 25-2020]
2 APRIL 2021

CIVIL PROCEDURE: *Stay – Application for – Stay of proceedings pending disposal of appeals against decision of Competition Commission – Whether there were special circumstances warranting stay of proceedings – Whether Competition Appeal Tribunal could stay any part of decision – Competition Act 2010, ss. 4(1), 13, 53(1), 57 & 58(2)*

General Insurance Association of Malaysia ('PIAM') had issued a Members' Circular No. 132 of 2011 ('Circular 132') to its members to inform them that a fixed rate had been set for the Parts Trade Discount and Labour Rate Charges for automobile repairer workshops under the PIAM Approved Repairers Scheme ('PARS workshops'). The fixed rates stated in Circular 132 were: (i) 25% for six vehicle makes, namely Proton, Perodua, Nissan, Toyota, Honda and Naza and 15% for Proton Saga base line model; and (ii) RM30 per hour but open for member companies to apply either Thatcham repair times or Opinion times as currently practised pending review of Thatcham repair times ('agreement'). This triggered the Federation Automobile Workshops Owners' Association to lodge a complaint with the Competition Commission ('MyCC') against the agreement. Following an investigation, MyCC (i) found that PIAM and its members, including the appellants, had, by entering into the agreement, infringed s. 4(1) of the Competition Act 2010 ('Act'); (ii) directed the appellants to undertake the following (a) to cease and desist from implementing the agreed parts trade discount for the vehicle makes and the hourly labour rate for PARS workshops with immediate effect; and (b) the future parts trade discount rate and the hourly labour rate for PARS workshops were to be determined independently by the 22 enterprises ('cease and desist orders'); and (iii) imposed financial penalties against the appellants in varying amounts ('financial penalties') ('decision'). Hence, the present appeal to the Competition Appeal Tribunal ('CAT') against the decision. The appellants further applied for a stay of proceedings pursuant to s. 53(2) of the Act

pending the disposal of their appeals. The appellants argued that (i) the agreement was entered into as a result of the 'directions' given by their regulatory authority, Bank Negara Malaysia ('BNM') and, as such, the appellants should not be penalised prematurely for their compliance with a legislative requirement which was a defence under s. 13 of the Act to be excluded from the prohibitions under s. 4 of the Act; and (ii) it was due to the unreasonable delay in claims settlement arising from disputes between the appellants and the PARS workshops that the agreement was created. In the event a stay is not allowed, it would unravel the effect of the agreement and revert to the problems faced in the past between the appellants and the PARS workshops, including delay in consumers making motor-vehicle insurance claims.

Held (allowing stay application pending disposal of appeals):

(1) The effect of the decision, especially the cease and desist orders, was to place the appellants and the PARS workshops back to their positions before the issuance of the Circular No. 132. The effect placed the appellants between a rock and a hard place. On one hand, the cease and desists orders prohibited the appellants from applying the fixed rate for the parts trade discount and labour rates charges in the agreement. On the other hand, the agreement was created by immense pressure placed on them from BNM, their sectoral regulator. BNM stood by its position that it had issued directives that were still in force. This meant that sanctions could be imposed on the appellants for non-compliance with BNM's directives and the agreement. The situation faced by the appellants was sufficient to qualify as special circumstances to justify the grant of a stay of the decision until the disposal of the appeal proper. (paras 35, 37, 38 & 44)

(2) In order to protect the interest of the public from the harm prior to the agreement, it was more prudent and just to allow a stay of the decision pending the disposal of the appeal. The disagreement between the appellants and the PARS workshops was over the pricing of the trade parts discounts and labour charges but the real victim caught in between is the public. If a stay is not granted, the agreement is undone and the impact would be greater on the public as opposed to the monetary impact suffered by the PARS workshops. (para 48)

(3) The CAT did not agree with the appellants' submission that the CAT had the powers within s. 57 and/or 58(2) of the Act to grant a stay on any part of the decision and to make orders as it deemed fit. Section 57 of the Act deals with the procedural powers while conducting the proceedings in respect of the appeals. Section 58(2) of the Act are in relation to the final decision of the CAT in respect of an appeal against the decision of the MyCC. Those powers do not extend to an application

for a stay order. Furthermore, the substratum of the decision centred on the agreement. The enforcement of the cease and desist orders would undo the agreement and that was the heart of the appeal of the appellants. In the event the CAT makes different orders for stay, namely to stay on the payment of the financial penalty but not to stay the cease and desist orders, or *vice versa*, this would make a mockery of the stay decisions. The stay of the cease and desist orders had to apply across the board. It could not be selectively granted based on the prayers of the appellants. The stay of the payment of the financial penalties had to go hand in hand with the stay application of the cease and desist orders because the power vested in the CAT, under s. 53(1) of the Act, referred to stay of the decision of the MyCC as a whole. (paras 57-59)

Case(s) referred to:

Ang Sue Khoon v. Majlis Bandaraya Pulau Pinang [2015] MLJU 1866 ***(refd)***

Bharti Airtel v. Competition Commission of India [2019] 2 MLJ 44 ***(refd)***

Datuk Seri Anwar Ibrahim v. Wan Muhammad Azri Wan Deris [2015] 2 CLJ 557 HC ***(refd)***

Godfrey Philips (Malaysia) Sdn Bhd v. Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia [2011] 9 CLJ 670 HC ***(refd)***

Kerajaan Malaysia v. Nooryana Najwa Dato' Sri Mohd Najib [2020] 9 CLJ 414 HC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Metropolitan Real and General Property Trust Ltd v. Slaters and Bodega Ltd [1941] 1 All ER 310 ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

Monsanto Holdings Pvt Ltd and Ors v. Competition Commission of India and Ors (WP(C) No 1776-2016 and WP(C) No. 3556-2017) ***(refd)***

Smith, Hogg & Co Ltd v. The Black Sea and Baltic General Insurance Co Ltd 162 LTR 11 ***(refd)***

The Government of Malaysia v. Datuk Kadir Mohamad Mastan & Another Case [1993] 4 CLJ 98 HC ***(refd)***

Legislation referred to:

Competition Act 2010, ss. 4(1), (2), (3), 13, 40(1), 51(1), 53(1), (2), 57, 58(2)(a), (b), (c), (d), Second Schedule

Competition Appeal Tribunal Rules 2015 [UK], r. 24

Competition (Appeals) Regulations [Sing], reg. 33(1)(a)

For CHUBB Insurance (Malaysia) Bhd - Nahendran Navaratnam; M/s Sreenevasan Young

For Great Eastern General Insurance (M) Bhd - Sudharsanan Thillainathan; M/s Shook Lin & Bok

For Tokio Marine Insurans (Malaysia) Bhd, Lonpac Insurance Bhd, Berjaya Sompo Insurance Bhd, Tune Insurance Malaysia Bhd & MPI Generali Insurance Bhd - Tunku Farik Tunku Ismail; M/s Azim, Tunku Farik & Wong

For Prudential Assurance Malaysia Bhd & Progressive Insurance Bhd - Nereen Kaur Veriah, Yon See Ting, Guan Shu Pei, Mithrra Kuladeva & Ashwini Nantha Balan

A *For AmGeneral Insurance Bhd, Allianz General Insurance Company (Malaysia) Bhd, Liberty Insurance Bhd & RHB Insurance Bhd - Anand Raj; M/s Shearn Delamore*
For AIA Bhd, AIG Malaysia Insurance Bhd, AXA Affin General Insurance Bhd & Zurich General Insurance Malaysia Bhd - Khoo Guan Huat; M/s Skrine
For MSIG Insurance (M) Bhd, Etiqa General Insurance Bhd, The Pacific Insurance Bhd & QBE Insurance (Malaysia) Bhd - Mark La Brooy; M/s Raja Darryl & Loh
B *For Pacific & Orient Insurance Co Bhd - Shanti Mogan; M/s Shearn Delamore & Co*
For Competition Commission - Lim Chee Wee; M/s Lim Chee Wee Partnership

Reported by Najib Tamby

JUDGMENT

C **Choo Kah Sing J (Chairman), Asmabi Mohamad J & Victor Wee Eng Lye (Comms):**

Introduction

[1] This is the written grounds of a unanimous decision of the
D Competition Appeal Tribunal (hereafter 'CAT') which was delivered on 23 March 2021 in relation to 22 interlocutory applications filed by the appellants to stay the decision of the Competition Commission (hereafter 'MyCC') dated 14 September 2020 (hereafter 'the decision'). The parties agreed for all the stay applications to be heard together.

E **[2]** In essence, MyCC found the appellants had infringed s. 4(1) read together with s. 4(2) and 4(3) of the Competition Act 2010 (hereafter 'the Act'). Pursuant to s. 40(1) of the Act, MyCC directed the appellants to undertake the following:

> (a) To cease and desist from implementing the agreed parts trade
F discount for 6 vehicle makes, namely, Proton, Perodua, Nissan, Toyota, Honda and Naza and the hourly labour rate for PARS workshops with immediate effect; and
>
> (b) The future parts trade discount rate and the hourly labour rate for PARS workshops are to be determined independently by the 22
G Enterprises.

(hereafter 'the cease and desist orders')

[3] Besides the cease and desist orders, MyCC has also imposed financial penalties against the appellants in varying amounts (hereafter 'the financial
H penalty'). However, in relation to the payment of the financial penalty, MyCC has granted the appellants the following:

> (a) a moratorium period for the payment of the financial penalty up to 6-months, to be calculated from the service date of this Decision; and
>
I (b) at the end of the moratorium period, the Parties are allowed to make the payment of the financial penalty by equal monthly instalment for up to 6 months.

(hereafter 'the moratorium')

[4] MyCC's decision has two parts, one is the cease and desist orders, and the other part is the financial penalty. The appellants had respectively filed an appeal to the CAT pursuant to s. 51(1) of the Act, and subsequent to that, the appellants had also respectively applied for a stay of the decision pursuant to s. 53(2) of the Act pending the disposal of their appeals.

[5] Below is a table depicting the grouping of the appellants, the appellants' firms of solicitors and their respective appeal case numbers:

Group	Firms of Solicitors	Appellants	TRP Nos.
A	Messrs. Sreenevasan Young	CHUBB Insurance Malaysia Berhad	TRP 2 - 2020
B	Messrs. Shook Lin & Bok	Great Eastern General Insurance (M) Berhad	TRP 4 - 2020
C	Messrs. Azim, Tunku Farik & Wong	Tokio Marine Insurans (Malaysia) Bhd	TRP 6 - 2020
		Lonpac Insurance Bhd	TRP 7 - 2020
		Berjaya Sompo Insurance Berhad	TRP 8 - 2020
		Tune Insurance Malaysia Berhad	TRP 9 - 2020
		MPI Generali Insurance Berhad	TRP10 - 2020
D	Messrs. Christopher & Lee Ong	Prudential Assurance Malaysia Berhad	TRP 11 - 2020
		Progressive Insurance Bhd	TRP 12 - 2020
E1	Messrs. Shearn Delamore & Co	Pacific & Orient Insurance Co Bhd	TRP 5 - 2020
E2	Messrs. Shearn Delamore & Co	AMGeneral Insurance Bhd	TRP 13 - 2020
		Allianz General Insurance Company (Malaysia) Berhad	TRP 14 - 2020
		Liberty Insurance Berhad	TRP 15 - 2020
		RHB Insurance Berhad	TRP 16 - 2020
F	Messrs. Skrine	AIA Bhd	TRP 17 - 2020
		AIG Malaysia Insurance Berhad	TRP 18 - 2020
		AXA Affin General Insurance Berhad	TRP 19 - 2020
		Zurich General Insurance Malaysia Berhad	TRP 20 - 2020
G	Messrs. Raja Darryl & Loh	MSIG Insurance (Malaysia) Bhd	TRP 21 - 2020
		ETIQA General Insurance Berhad	TRP 22 - 2020
		The Pacific Insurance Berhad	TRP 23 - 2020
		QBE Insurance (Malaysia) Berhad	TRP 24 - 2020

A **Brief Background Facts**

[6] The decision stems from an official complaint lodged by the Federation Automobile Workshops Owners' Association (hereafter 'FAWOAM') with MyCC.

B **[7]** FAWOAM's complaint was that the General Insurance Association of Malaysia (hereafter 'PIAM') and its members (the appellants and others) had by an "agreement" collectively decided to have a fixed rate for the parts trade discounts and labour rates charges against those automobile repairer workshops under the PIAM Approved Repairers Scheme (hereafter 'the PARS workshops').

C **[8]** Before the complaint was lodged with MyCC, PIAM had issued a Members' Circular No. 132 of 2011 (hereafter 'the Members' Circular No. 132') on 28 July 2011 to its members to inform the members that a fixed rate had been set for the parts trade discount and labour rate charges for the D PARS workshops.

[9] The fixed rates stated in the Members' Circular No. 132 are as follows:

> **Parts Trade Discount**
>
> E 25% for the six vehicle makes namely Proton, Perodua, Nissan, Toyota, Honda and Naza and 15% for Proton Saga Base Line Model (BLM);
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> Labour Rates
>
> RM30.00 per hour but open for member companies to apply either Thatcham repair Times or Opinion Times as currently practice (*sic*) F pending review of Thatcham repair Times.

(hereafter 'the impugned agreement')

[10] FAWOAM's complaint triggered an investigation by MyCC against PIAM and its members over the impugned agreement. MyCC found PIAM and its members (including the appellants) had, by having entered into the G impugned agreement, infringed s. 4(1) of the Act. Section 4 of the Act states:

> 4(1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.
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> H
>
> (2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to:
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> (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
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> I
>
> (b) share market or sources of supply;
>
> (c) limit or control:

(i) production;

(ii) market outlets or market access;

(iii) technical or technological development; or

(iv) investment; or

(d) perform an act of bid rigging,

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

(3) Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition.

[11] Dissatisfied with the decision, the appellants have respectively filed appeals to the CAT. Subsequent to the filing of the appeals, the appellants sought for a stay of the decision pending the disposal of their appeals.

The Findings

The Test

[12] Section 53 of the Act states as follows:

53(1) Pending the decision of an appeal by the Competition Appeal Tribunal, a decision of the Commission shall be valid, binding and enforceable except where a stay of the decision of the Commission has been applied for by the appellant and granted by the Competition Appeal Tribunal.

(2) An application for a stay of decision shall be in writing and shall be made to the Competition Appeal Tribunal on or after the day on which the notice of appeal has been filed with the Competition Appeal Tribunal.

[13] The Act is silent as to what factors are to be considered by the CAT in deciding whether to grant a stay of a decision made by the Commission pending disposal of the appeal or not.

[14] MyCC's counsel had urged the CAT to apply the "special circumstances" test enunciated in the Malaysian Federal Court case of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257.

[15] The essence of what the "special circumstances" test is can be found in the following paragraphs of the judgment:

[13] …An appreciation of the meaning of the phrase 'special circumstances' may resolve the confusion. As Ian Chin JC (as he then was) said in *Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and Another Application* [1993] 3 MLJ 514 at p 521:

An attempt was made to define special circumstances by Raja Azlan Shah (as His Majesty then was) in the case of *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86, *viz*:

> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

The definition only serves to emphasise the fact that there are myriad circumstances that could constitute special circumstances with each case depending on its own facts. I am of the opinion that the list of factors constituting special circumstances is infinite and could grow with time. Any attempt to limit the list or close a category would be to impose a fetter on the exercise of discretion of the court whether to grant or stay an execution; making the discretion less of a discretion. This is surely not what discretion is all about.

[14] The resultant matter for determination are the factors or reasons that may constitute special circumstances. Generally stated, they are circumstances which go to the enforcement of the judgment (see *Sarwani a/p Ainuddin v. Abdul Aziz a/l Ainuddin* [2000] 5 MLJ 391). With regard to the specific factors that constitute special circumstances, I refer again to *Government of Malaysia v. Datuk Haji Kadir Mohamad Mastan and Another Application* where Ian Chin JC (as he then was) said at pp 520-521:

> What, then, constitute special circumstances? It was said in *Mohamad Mustafa v. Kandasami (No. 2)* [1979] 2 MLJ 126, at p 127, that:
>
> > One of the determining factors that calls for consideration is whether by not making an order of stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.
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> …
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> [18] … It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus, they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related … As nugatoriness is a species of special circumstances, a

> mere reference to it is sufficient to convey the correct legal impression. Any attempt to restrict the grant of a stay to nugatoriness, quite apart from its impropriety, will severely restrict the grounds on which an application may rely …

[16] To surmise, the list of categories of factors that may constitute special circumstances is not closed. The consideration whether a successful appeal would be rendered nugatory if stay was refused is within the myriad circumstances that could constitute special circumstances. The apex court recognises there are many other circumstances which could constitute special circumstances. For example, where execution would destroy the subject matter of the action or deprive the appellant of the means of prosecuting the appeal (see *Smith, Hogg & Co Ltd v. The Black Sea and Baltic General Insurance Co Ltd* 162 LTR 11); if the judgment was to be enforced and money has been paid, the appellant would have difficulties recovering the money if the appeal was allowed (see *Rosengrens Ltd v. Safe Deposit Centres Ltd* (unreported, 19th July 1984, CA, Lexis Nexis)); or if payment of a judgment sum was made would destroy the substratum of the appeal (see *Metropolitan Real and General Property Trust Ltd v. Slaters and Bodega Ltd* [1941] 1 All ER 310).

[17] It is observed that the apex court placed emphasis on 'circumstances which go to the enforcement of the judgment'. In other words, if the judgment were to be enforced, would that enforcement impact a court decision that is later reversed on appeal. Should this tribunal, a *quasi*-judicial body, adopt the court's approach in deciding to grant a stay of the decision?

[18] In *Godfrey Philips (Malaysia) Sdn Bhd v. Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia* [2011] 9 CLJ 670, p. 678, the High Court states as follows:

> [28] It must be noted that a stay of the proceedings as in a suspension of a unilateral *ex parte* decision of an administrative decision maker is drastically different thing from a stay of execution of a judgment of a court of law after a full blown trial and a determination on the merits have been made *inter partes*. An attempt to equate the two processes would be inappropriate.

[19] In *Godfrey Philips (M) Sdn Bhd*, the applicant filed an application for judicial review and sought for *certiorari* and *mandamus* orders to quash a decision made by the respondent, the regulatory body over the applicant's products, in refusing to accept or approve the applicant's declaration of the retail selling price of its new tobacco product. At the same time, the applicant also applied for a stay and/or prohibition orders against the decision of the respondent pending disposal of the judicial review application. The High Court held as follows:

A [29] The court is of the considered opinion that in order to obtain stay and to restrain and/or prohibit the 1st respondent from acting on the Impugned Decision dated 21 January 2010, the applicant must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of stay and/or prohibition order, that the balance of equities tips in its favour, and that a stay and/or prohibition B order is in the public interest. In exercising its discretion, the court should pay particular regard to the public consequences in granting the orders sought by the applicant.

[20] Leave was granted for the judicial review application, but the application to stay the impugned decision was not allowed because the C applicant did not satisfy the considerations above. At the end of the judgment, the learned judge concluded that "the court is not persuaded that there are special circumstances which would justify the grant of the said prayers (c) and (d)." Prayer (d) was a prayer to stay the respondent's decision.

[21] The decision of the High Court in *Godfrey Philips (M) Sdn Bhd* clearly D distinguished the two types of decisions, one an administrative decision and the other a decision of the court of law. Hence, the considerations for a stay of the two types of decisions would be distinct from each other. However, at the end of the judgment, the High Court stated its decision was based on the consideration of special circumstances test for the stay application.

E **[22]** As stated earlier, the emphasis on whether to grant a stay application or not for a decision of the court is mounted on the 'circumstances which go to the enforcement of the judgment'. However, in *Godfrey Philips (M) Sdn Bhd*, the emphasis was mounted not on the 'circumstances which go to the enforcement of the judgment', but rather the appellant's interests as well as F public interest. The considerations are the applicant's chances of success based on the merits in the appeal, and that the applicant is likely to suffer irreparable harm in the absence of stay order, and that the balance of equities tips in the applicant's favour, and that a stay order is in the public interest.

G **[23]** The High Court decision proffers that emphasis could be extended to the applicant's interest when a stay is in relation to a decision made in an administrative process. Further, it also proffers that those considerations of the applicant's interests could be part of the myriad circumstances that constitute special circumstances, when considering a stay of a decision of an administrative body or an enforcement agency, like the MyCC.

H **[24]** The above propositions appear to echo the statutory position in foreign jurisdictions. The Competition Act in Singapore, particularly reg. 33 of the Competition (Appeals) Regulations states as follows:

I

33(1) The Board may, on the application of a party or of its own initiative, make an order on an interim basis:

(a) Suspending in whole or part the effect of any decision which is the subject matter of the appeal proceedings before it; or

(b) Granting any remedy which the Board would have the power to grant in its final decision.

(2) Without prejudice to the generality of paragraph (1), if the Board considers that it is necessary as a matter of urgency for the purpose of:

(a) preventing serious, irreparable damage to a particular person or class of persons; or

(b) protecting the public interest,

the Board may give such directions as it considers appropriate for that purpose.

(3) The board shall exercise its power under this regulation taking into account all the relevant circumstances, including:

(a) the urgency of the matter;

(b) the effect on the party making the request if the relief sought is not granted; and

(c) the effect on competition if the relief is granted.

(4) Any order or direction under this regulation is subject to the Board's further order, direction or final decision.

[25] The r. 24 of the Competition Appeal Tribunal Rules 2015 in England has a provision similar to Singapore's reg. 33 of the Competition (Appeals) Regulations. In England, the consideration is "preventing significant damage to a particular person or category of person," instead of "preventing serious, irreparable damage to a particular person or class of persons." Clearly, third party interest is also included for consideration.

[26] In *Ang Sue Khoon v. Majlis Bandaraya Pulau Pinang* [2015] MLJU 1866, the Appeal Board created under the Town And Country Planning Act 1976 held as follows when considering a stay of a planning permission:

[48] From the above analysis, I would summarise the law applicable to the stay of the implementation or execution of a planning permission, as follows:

(a) An appeal from the local authority to the Appeal Board does not operate as a stay.

(b) To grant or refuse a stay is a matter of discretion, which must be exercised judiciously and in accordance with established principles. Principally, a stay can be granted only if there are special circumstances sufficient to tilt the scale of justice in favour of the stay-applicant.

A (c) Special circumstances are circumstances that are not ordinary, or not common; and that are usually "a combination of certain determining factors … to persuade the court [or the Board] that it is a just and appropriate case to grant a stay" (see *Jaya Harta; op. cit*.). Merits in an appeal are not special circumstances; but absence-of-merit could operate against the stay applicant.

B (d) The types of special circumstances are, for good reasons, not closed. Examples of special circumstances include where an appeal would be rendered nugatory if a stay is not granted, where the substratum of an appeal will be destroyed if a stay is refused (see *Kosma, op. cit*.), where the integrity of an appeal needs to be maintained (see *Tan* C *Tien Seng, supra*), or where serious injury may befall the stay-applicant if a stay is refused (see *Siglin v. Choules, supra*) …

(e) In considering where the balance of justice lies, competing interest of the parties must be weighed against each other, and (in planning cases) public interest should also be taken into account. Some D questions which may be properly asked when undertaking this exercise are set out in paragraph 38 above.

(f) …

[49] It is likely that, in the majority of cases, how the discretion to either grant or refuse to stay ought to be exercised will have become clear after E applying the principles similar to those employed in deciding the stay of execution of a court judgment, without having to resort to the 3 additional factors peculiar to planning cases originating from a local planning authority. However, in borderline cases, they could make a difference, and could assist in arriving at a decision as to what is the fairer order to make.

F **[27]** With regard to the borderline cases, the Appeal Board has this to say in the earlier part of the judgment:

[31] Looking at it through the broad lens of justice, special circumstances become often easy to recognise, though remaining difficult to define or describe with precision (perhaps for the better). There are a variety of G situations which a reasonable and objective observer will quickly recognise as 'special circumstances'; and others at the opposite end of the spectrum which are easily identified as falling short of being special circumstances. A judge or adjudicator faced with either of these categories of circumstances will have little difficulty in reaching a decision to either H grant or refuse a stay.

[32] Then there will be grey areas where it is harder to say with confidence on which side of the line their circumstances fall, and with respect to which reasonable persons may come to different conclusions. In such situation, the exercise of balancing the interests of the respective parties will become much more challenging. I will refer to these situations as I "borderline cases".

[28] It is clear from the decision that the Appeal Board, a *quasi*-judicial body like CAT, has subscribed to the special circumstances test in deciding a stay application pending disposal of an appeal to the Appeal Board. However, the Appeal Board qualifies the application of special circumstances test by recognising that a decision of a court of law does not share the same platform with a decision made by public/governmental bodies. A decision of the court is "mostly concerned with *in personam* disputes between individual parties," whereas, a decision made by public/governmental bodies often involves element of public interest. Hence, "the exercise in the balancing of interests will usually have to include public interest, in addition to the competing interests of the parties themselves."

[29] Based on the above analysis, the High Court in *Godfrey Philips (M) Sdn Bhd* has incorporated the considerations of the applicant's chances of success based on the merits in the appeal, and that the applicant is likely to suffer irreparable harm in the absence of a stay order, and that the balance of equities tips in the applicant's favour, and that a stay order is in the public interest in deciding a stay application of a decision made by a public/governmental body. In *Ang Sue Khoon*, the Appeal Board, a *quasi*-judicial body, applied the special circumstances test to a stay application.

[30] What special circumstances are remain fluid, it depends on a case to case basis. "The list of factors constituting special circumstances is infinite and could grow with time," as per Justice Ian Chin in *The Government of Malaysia v. Datuk Kadir Mohamad Mastan & Another Case* [1993] 4 CLJ 98; [1993] 3 MLJ 514, p. 102 (CLJ); p. 521 (MLJ).

[31] Based on the discussion of the Malaysian cases above, the law in Malaysia is clear that the test for a stay application, whether in the court process or in a *quasi*-judicial process, is the special circumstances test. This tribunal is not ready to depart from this established position of law. However, the tribunal is ready and willing to consider public interest and the applicant's interest over and above the special circumstances test in determining a stay application in view of the legal propositions enunciated in *Godfrey Philips (M) Sdn Bhd.* This tribunal finds that it is not necessary to rely on the legal position in foreign jurisdictions with regard to the applicable test for a stay application, because we have our own jurisprudence of law on the subject matter.

Special Circumstances – A Conundrum

[32] The appellants' counsels had submitted in their alternative arguments that if CAT were to adopt the special circumstances test, there are special circumstances in these given facts which warrant a stay of the decision.

[33] Essentially, the appellants' argument is that the impugned agreement was entered into as a result of the "directions" given by their regulatory authority, Bank Negara Malaysia (hereafter 'BNM'). As such, the appellants should not be penalised prematurely for their compliance with a legislative requirement which is a defence under s. 13 of the Act to be excluded from the prohibitions under s. 4 of the Act.

[34] It was due to the unreasonable delay in claims settlement arising from disputes between the appellants and the PARS workshops that the impugned agreement was created. In the event a stay is not allowed, it would unravel the effect of the impugned agreement and revert to the problems faced in the past between the appellants and the PARS workshops, including delay in consumers making motor vehicle insurance claims, the appellants' counsels argued.

[35] The CAT is of the view that the effect of the decision, especially the cease and desist orders, is to place the appellants and PARS workshops back to their positions before the issuance of the Members' Circular No. 132. This is evidenced by a recent press release issued by BNM dated 30 September 2020 which states as follows:

> Bank Negara Malaysia (BNM) regrets MyCC's decision as the arrangement was put in place through the facilitation and direction of BNM to the general insurers to address disputes between workshops and general insurance companies that had adversely impacted consumers. This was due to protracted delays and disagreements over insurance claims payments for motor repairs. The resulting arrangement was implemented after discussions between PIAM and the Federation of Automobile Workshops Owners Association of Malaysia (FAWOAM). As a result of BNM's regulatory intervention, delays in settlement of claims arising from motor repairs had reduced significantly and policyholders were better served by a more efficient claims settlement process. For example, the average turnaround time from date of notification of an accident to the completion of repair works had reduced by 55% since 2010.
>
> The decision by MyCC may unravel the positive outcomes from past and ongoing initiatives by BNM and the industry to curb fraud and improve efficiency in the motor claims process. This in turn will have wider ramifications for access to and the cost of motor insurance for Malaysian consumers.

[36] BNM has made clear its stand on the decision made by MyCC and its continued support for the need for the impugned agreement. As early as 13 February 2017, BNM wrote to MyCC to inform that "the industry agreement is therefore the direct outcome of a directive of the bank." Counsel for Group E2 submitted that there were in fact six directives from BNM to PIAM, three in writing dated 4 June 2010, 14 June 2011 and 4 July 2011, and three during meetings held on 3 August 2010, 1 September 2010 and 21 December 2010.

[37] The effect of the cease and desist orders has indeed put the appellants between a rock and a hard place. On one hand, the cease and desist orders prohibit the appellants from applying the fixed rate for the parts trade discount and labour rates charges in the impugned agreement. On the other hand, the impugned agreement was created by the immense pressure placed on them from BNM, their sectoral regulator.

[38] Counsel for BNM (in the appeal) confirmed before the tribunal during the hearing of the stay application that BNM stands by its position that it has issued directives that are still in force. This means that sanctions could be imposed on the appellants for non-compliance with the BNM's directives and impugned agreement.

[39] MyCC's stand in relation to the BNM's letters is encapsulated in its written grounds of decision at para 328 that states as follows:

> ... Further, we are of the view that the 3 letters by BNM to PIAM are not directives but in law are merely advisory in nature. The enterprise must show that it does not have autonomy in determining their conduct in the market in the light of the legislative requirement that was imposed upon them by the authority.

[40] One of the main arguments in the appellants' appeals is that the BNM's letters were directives which had led to the formation of the impugned agreement, therefore, it ought to be excluded from the prohibition in s. 4 of the Act.

[41] This tribunal is of the view that issues such as whether those BNM's letters were or were not directives and whether the situation could fall within the Second Schedule of the Act are the heart of the appeal, and they ought to be determined in the appeal proper. It is premature for the tribunal in the stay application to make any finding as to the nature of those BNM's letters.

[42] Hence, the argument put forth by the appellants' counsels that those BNM's letters were directive in nature, and the argument by MyCC that those BNM's letters were merely advisory in nature, could not, at this juncture, be determined by the tribunal.

[43] MyCC's counsel conceded in the submission that the determination of whether those BNM's letters were or were not directives ought to be addressed at the appeal proper.

[44] The appellants are sandwiched in between two regulators whose instructions may appear to be at loggerheads; breaching either one could result in repercussions by these regulatory bodies. The more pressing and impending one would be the decision of MyCC. In this circumstance, the tribunal is of the opinion that the situation faced by the appellants is sufficient to qualify as special circumstances to justify the grant of a stay of the decision until the disposal of the appeal proper.

[45] The MyCC's counsel submitted that there is no evidence as to any risk of sanction by BNM. This tribunal could not agree with this submission because no one would be in a position to assume BNM would not take action. BNM has all the right to impose sanctions against the appellants if it decides to do so. It is not for the tribunal to brush off such a risk.

[46] MyCC's counsel also cited two cases to illustrate that jurisdictional conflict between two regulatory bodies is not uncommon (see *Bharti Airtel v. Competition Commission of India* [2019] 2 MLJ 44 and *Monsanto Holdings Pvt Ltd and Ors v. Competition Commission of India and Ors* (WP(C) No. 1776-2016 and WP(C) No. 3556-2017) date of decision: 20 May 2020). Those cases are not authorities in support of opposing a stay application.

[47] Jurisdictional conflicts among regulatory bodies or government agencies are indeed not uncommon. However, when the jurisdictional conflict places a party in a difficult position to choose one against the other, and that choice, either way, has a repercussion on the interest of the public, then that jurisdictional conflict could not be taken lightly. In this circumstance, the tribunal is of the view that it would be best to maintain the *status quo*, while the appeal process takes its course.

Public Interest

[48] The CAT is of the considered view that in order to protect the interest of the public from the harm prior to the impugned agreement, it is more prudent and just to allow a stay of the decision pending the disposal of the appeal. On the facts, PARS workshops were aggrieved by the impugned agreement. However, the grief is only monetary in nature. The disagreement between the appellants and the PARS workshops was over the pricing of the trade part discounts and labour charges. The real victim caught in the disagreement is the public. It is mandatory for all motor-vehicles to be insured under Malaysian law. The impugned agreement was meant to address the unhappiness of the public or consumers over their motor-vehicle insurance claims. The consumers' motor-vehicle insurance claims were delayed before the impugned agreement was in place. The delay was caused by the disagreement over pricings between the appellants and the PARS workshops. If a stay is not granted pending disposal of the appeal, this would unravel the effect of the impugned agreement and the adversities faced by the public in the past will return. This tribunal has considered the fact that the impact of the impugned agreement is only on the PARS workshops. The impact is merely monetary in nature. If a stay is not granted, the impugned agreement is undone, and the impact would be greater on the public as opposed to the monetary impact suffered by the PARS workshops. In view of that public interest is at stake, the stay application ought to be allowed pending the disposal of the appeal.

Other Considerations – Which Are Not Favourable For A Stay

[49] With regard to the consideration of irreparable harm, this tribunal finds that if stay was not granted, the appellants would not suffer any irreparable harm. If there is any harm, the harm would more likely be the harm that could be inflicted on the general public, ie, the consumers, which has been considered under the head of public interest consideration.

[50] With regard to the submission of "reputational harm" arising from the enforcement of the cease and desist orders, this tribunal is of the view, it could not constitute a special circumstance. This tribunal is not persuaded that the decision could affect the appellants' reputation as there is no sufficient evidence to suggest their reputations would be affected. Hence, the tribunal could not see that if a stay was not granted, it would cause any irreparable harm to the appellants as opposed to the harm to the public interest as discussed above.

[51] This tribunal agrees with the submission of the MyCC's counsel in that the need to make payment of the financial penalty pending appeal could not constitute special circumstance (see *Kerajaan Malaysia v. Nooryana Najwa Dato' Sri Mohd Najib* [2020] 9 CLJ 414; [2020] 11 MLJ 242; *Datuk Seri Anwar Ibrahim v. Wan Muhammad Azri Wan Deris* [2015] 2 CLJ 557; [2014] 10 MLJ 741). Notwithstanding what has been stated, the tribunal has granted a stay on the financial penalty imposed on the appellants – this will be explained later in the decision.

[52] With regard to the reliance on the factor of the weak economy as a result of the worldwide pandemic of Covid-19, although this is a very unusual phenomenon suffered by all levels of society, this could not constitute a special circumstance. Although MyCC had taken into account the economy situation when it granted a moratorium on the payment of the financial penalty, this could not be a reason for the tribunal to accept weak economy as a special circumstance. The granting of a moratorium on the payment of the financial penalty is at the discretion of the Commission. The exercise of the discretion is the prerogative of the Commission. It is not for this tribunal to grant a stay just because MyCC had elected to exercise its discretion in view of the global pandemic.

[53] The tribunal had considered all the appellants' respective counsels' submissions on other reasons for a stay, other than those discussed above. The tribunal is not persuaded that those other reasons submitted by the appellants' respective counsels could constitute special circumstances for a stay.

[54] This tribunal had also considered the merits of the appeal, not on whether the appellants will or will not succeed, but rather whether there is any merit at all. This tribunal had deliberated on this and found there is merit on the face of the appeals. Merit in a stay application may not be a determining factor (see *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380; [2002] 3 MLJ 49), but the absence of merit (on the face of it) in an appeal would mean that the stay application is futile.

In Surmise

[55] This tribunal is satisfied that it is unnecessary to discuss where the balance of equities tips or to consider the balance of interest test or where the balance of convenience lies in order to grant or not to grant a stay. This is because the tribunal is overwhelmingly convinced that the peculiar position that the appellants are in is sufficient to justify a stay, and sufficient to constitute a special circumstance within the myriad of special circumstances. In addition to that, the consideration of public interest to grant a stay has outweighed all other considerations because the public is the ultimate and real victim of the disagreements between the appellants and the PARS workshops and between MyCC and BNM and between MyCC and the appellants. There is no evidence to suggest that the public was not satisfied when the impugned agreement was in place. The complaints from the public were made prior to the existence of the impugned agreement. There is no evidence to suggest that the public was still unhappy after the impugned agreement was effected.

Complete Stay

[56] The tribunal notes that the stay applications made by the appellants did not ask for the same orders. The appellants from Groups C, E1 and G sought for only an order to stay the payment of the financial penalty. The appellants in Groups A, B (in the alternative), D and F sought for an order to stay both the application of the cease and desist orders and payment of the financial penalty. The appellants in Group E2 sought for a stay of the payment of financial penalty and other specific orders. This tribunal unanimously decides to grant a complete stay of the cease and desist orders and payment of the financial penalty for two reasons.

[57] First, s. 53(1) of the Act is the provision that vests the power on the CAT to stay the decision of MyCC. The provision does not state any other powers other than the power to stay a decision of the Commission, unlike the Competition Act in Singapore, particularly reg. 33(1)(a) of the Competition (Appeals) Regulations. Counsels for the appellants submitted that CAT has the powers within s. 57 and/or 58(2) of the Act to grant a stay on any part of the decision and to make any other orders as it deems fit. This

tribunal could not agree with the submission. This tribunal is of the considered view that the powers vested in CAT under s. 57 of the Act are procedural powers while conducting the proceedings in respect of the appeals. With regard to the powers vested in the CAT under s. 58(2), those powers are in relation to the final decision of the CAT in respect of an appeal against the decision of the Commission. Section 58(2) of the Act states:

> (2) The Competition Appeal Tribunal **may confirm or set aside the decision which is the subject of the appeal,** or any part of it, and may -
> …

[58] Those powers stated therein do not extend to an application for a stay order. Those powers (sub-ss. (a) to (d)) are meant for a final order of the decision of the CAT after hearing the merits of an appeal, not a stay application.

[59] Secondly, the substratum of the decision of MyCC centres on the impugned agreement. The enforcement of the cease and desist orders would undo the impugned agreement, and that is the heart of the appeal of the appellants. In the event this tribunal makes different orders for stay, namely to stay on the payment of the financial penalty, but not to stay the cease and desist orders, or *vice versa*, this would made a mockery of the stay decisions. The stay of the cease and desist orders has to apply across the board. It could not be selectively granted based on the prayers of the appellants. The stay of the payment of the financial penalty has to go hand in hand with the stay of the application of the cease and desist orders, because the power vested in CAT under s. 53(1) of the Act refers to stay of the decision of the Commission as a whole.

[60] Based on the two reasons above, the CAT has no hesitation to grant a blanket stay of the decision pending the disposal of the appeals.

Conclusion

[61] For the reasons stated above, the CAT unanimously decides and orders that the decision of the MyCC dated 14 September 2020 comprising:

(i) the cease and desist orders; and

(ii) the financial penalty imposed on all the appellants,

be stayed pending the disposal of the respective appeals filed by the appellants.

[62] The CAT also decides that there will be no order as to costs.